No. 3093

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GRAYS HARBOR TUG BOAT COMPANY
(a corporation),

Appellant,

vs.

R. PETERSEN,

Appellee.

BRIEF FOR APPELLEE

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PERNAU-WALSH PRINTING CO.

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STATEMENT.

The general facts of the case.

This is a suit *in personam* against the appellant for damages. The general facts of the case are as follows:

On the 5th day of October, 1910, the barkentine, "Jane L. Stanford," having on board a full cargo of more than one million feet of lumber, was at Aberdeen, Grays Harbor, ready to proceed on a voyage to Australia and needing assistance of a tug to cross the bar which obstructs the entrance to Grays Harbor. Without any special contract therefor, the appellant furnished a tug which towed the barkentine to the vicinity of the bar, but, conditions being unfavorable for crossing it safely, took her to anchorage within

the harbor where she remained, storm-bound, three weeks. After the storm had abated, the steam tug "Cudihy," owned and operated by the appellant, towed the barkentine out to sea, but, in crossing it, she struck hard on the bar, whereby she was so badly injured that it was necessary for her to go into the Columbia River and to a drydock near Portland where she was repaired. This suit was commenced in December, 1910, by the master of the barkentine, as representative of the owners of the ship and cargo. Honorable Edward E. Cushman, the district judge before whom the case was tried, rendered two written decisions: one on the main question as to the right of the appellee to recover damages (Ap. 26), and the other assessing the damages (Ap. 41).

The damages awarded include cost of repairs, necessary expenses incidental to the mishap, demurrage, and interest on the amount of the cash outlay at 6 per cent. per annum for only five of the seven years that intervened between the time of the injury and the date of the decree.

By the stipulations (Ap. 50, 140) and the assignment of errors (Ap. 137), the controversy to be determined by this court is restricted to the main question as to the appellant's liability for any damages and three items of expense and the interest allowed by the trial court.

The particular facts of the case.

(1) It is apparent from all the evidence, and a well-known fact, that there is a bar at the entrance to Grays

Harbor which can be passed by vessels of deep draft only through certain channels, so that knowledge and skill of a pilot is essential to the safety of such a vessel in entering or going out.

(2) When loaded for the voyage in question, the draft of the "Jane L. Stanford" was 19 feet and 10 inches forward and 20 feet and 2 inches aft (Ap. 52).

(3) After leaving her loading berth, the ship was storm-bound inside of the harbor three weeks. The ocean cannot become smooth immediately after a tempest; necessarily, there will be rolling billows for a considerable time and, in fact, the ship encountered three great swells right on the bar (Ap. 54, 60).

(4) At the time of the mishap, the depth of water on the crest of the bar was not more than 22 feet, so that if the sea had been smooth there would have been less than two feet of water under the ship's keel. The last soundings taken by the appellee before the ship struck the bar showed four and one-half fathoms on the sounding line (Ap. 54). Allowance must be made for two conditions. First: the bar is not flat—the water shoals toward the top. This is proved by the fact that four and one-half fathoms was the least depth of water found. A preceding cast of the line showed seven fathoms (Ap. 55), and two minutes after striking on the bar the ship was in deep water. Therefore, it is apparent that when the reading of the sounding line was four and one-half fathoms the sinker rested on an incline and not on the highest part of the bar. Second: an exact measurement cannot be made in rough water. Waves wet the line higher than when

soundings are taken in smooth water. It is usual to allow from two to five feet for that condition (Ap. 54). In his opinion, Judge Cushman made a note of these conditions and he also noted, as a significant fact, that, although it was shown that soundings were taken on the tug, there was no evidence as to what they showed (Ap. 30-1).

(5) Before taking the barkentine in tow, the "Cudihy" made two reconnaissances of the bar. Finding conditions unfavorable in the morning, she came back to where the barkentine was anchored and made that report to Captain Petersen (Ap. 53, 59). At 1 P. M. she went for a second view. Then Captain Olson, her master, deemed the bar "passable" (Ap. 59), although he appears to have observed that there was a northwest wind and that swells were coming from the *west north* (Ap. 84).

(6) The "Cudihy," with the barkentine in tow, started at 2:30 P. M. and was at the red buoy at 3:45 P. M. (Ap. 53). That buoy is 400 or 500 yards inside the bar (Ap. 83). Fifteen minutes after passing the buoy the barkentine bumped on the bar, so it was 4 P. M. and two hours before high tide when that occurred (Ap. 54). This is confirmed by Captain Olson's testimony that the tide had been flooding one hour when he looked at the bar the second time (Ap. 86). Captain Petersen says definitely that this was at 1 P. M. (Ap. 53); Captain Olson's testimony in this regard is indefinite and appellant is not, of course, entitled to the benefit of the doubt, especially since Captain Olson does not positively contradict Captain

Petersen's precise statement of the time. By any reckoning that can be made from all the evidence the tide had been flooding not more than four hours before the time when the "Stanford" was on the bar, and this time (two hours before flood) was not the most favorable stage of the tide for crossing the bar, and Captain Olson knew that it was not (Ap. 86).

(7) At the time of crossing the bar the dangerous conditions were obvious. The sea was rough and lumpy, swells were rolling (Ap. 57), there was a northwest wind, and it was two hours before high tide. Warning was given by the whistle of another tug which crossed with a lighter vessel in tow ahead of the "Cudihy" when she was at the red buoy (testimony of Johnson, witness for the appellant (Ap. 92). It is admitted by the pleadings that there was a heavy swell and sea breaking on the bar (Ap. 14).

(8) Captain Olson took upon himself the full responsibility of a bar pilot. Instead of consulting with Captain Petersen, he peremptorily ordered him to heave up the barkentine's anchor and grab the tow line (Ap. 60), and he chose as the route for crossing the bar a channel with which Captain Petersen was not acquainted, he having never been through that channel, although he had been navigating in and out of Grays Harbor for six years (Ap. 53, 62). That channel was not buoyed (Ap. 62, 83). The best known channel was marked straight throughout (Ap. 82).

(9) The three big swells came against the barkentine abeam and she was in the trough of the sea between them (Ap. 62). She bumped hard twice—first aft,

then forward (Ap. 61), as a heavily laden vessel would do rolling and pitching in a valley of water between billows.

(10) That the barkentine did strike on the bar is proved by the testimony of Captain Petersen above cited and by the testimony of Thompson, her second mate (Ap. 69, 71), Fred Johnson (Ap. 72), and Mrs. Petersen (Ap. 77), and proved conclusively by the effect on the ship. Although she had been on the beach while waiting in the harbor, she was tight until she struck on the bar. Immediately afterwards her pumps were sounded and then the water in her was only eight inches, which was normal; twenty minutes afterwards there were twenty inches (Ap. 55). As soon as sails could be set, all hands, except one man required as lookout, were ordered to work her two pumps. She then had forty-two inches of water in her and it was necessary to keep both pumps working to discharge the continued inflow. That the ship was very seriously injured became apparent when she was put into the dry-dock (testimony of Captain Crowe, Ap. 74, 77).

(11) By reason of failing to discover by the first sounding of the pumps that the ship was leaking, Captain Petersen did not inform the captain of the "Cudihy" that his ship was damaged, but did tell him that she had struck on the bar and requested him to notify the appellant of that fact (Ap. 55, 87, 88).

(12) The foregoing statements are in harmony with the decision on the merits rendered by Judge Cushman, and, as he gave careful consideration to every detail of the case, we invoke the rule that this court

will not disturb the findings of a trial court without convincing proof of error.

It is to be noted that the testimony quoted in the opinion differs from what is contained in the abstract of testimony in the printed apostles. That circumstance is explainable by the fact that what the record contains is only a condensed abstract.

BRIEF OF THE ARGUMENT.

The law applied to the facts of this case.

Such facts being established, the legal obligation of the owner of the "Cudihy" to render compensation for the recovery is incontestable. The decision to be rendered must be governed by legal principles that are, in legal parlance, deemed settled law.

When there is no special contract to be considered and the master of a tug assumes responsibility without consulting the master of a vessel to be towed as to any of the details of the time or manner of performing a towage service, it is his right and duty to have and exercise complete command of both vessels and to perform the towage service with the knowledge, skill and prudence necessary for safety.

The Quickstep, 9 Wall. 665, 19 L. Ed. 767;
The Margaret, 94 U. S. 494, 496, 24 L. Ed. 146;
The Fort George, 183 Fed. 731, 106 C. C. A. 169;
The Doris Eckhoff, 50 Fed. 134, 1 C. C. A. 494;
Transportation Line v. Hope, 95 U. S. 297, 24 L. Ed. 477.

In towing a ship out of a harbor obstructed at its entrance by a bar, the master of the tug must know the ship's draft and all the conditions of weather, tides, currents, channels and peculiarities of the bar essential for a bar pilot to know, and for him, either through ignorance or carelessness, to tow a ship out of safety into a dangerous situation on the bar when he knows, or should know, that the conditions are in any respect such as to expose the ship to peril, is wrongful and for any injury to the ship resulting from such wrong the owner of the tug is, by the rule of respondeat superior, responsible.

The Margaret, 94 U. S. 494;

Gilchrist Trans. Co. c. Great Lakes T. Co., 237 Fed. 432 at 434;

Cons. Coal Co. v. Knickerbocker Steam Towage Co., 200 Fed. 840;

The Fort George, 183 Fed. 731;

Winslow v. Thompson, 134 Fed. 546;

The Inca, 130 Fed. 36.

This rule in its utmost rigor was enforced by this court in the case of

Humboldt Lumber Manufacturers' Assn. v. Christopherson, 73 Fed. 239.

The fallacies in appellant's argument.

Aside from the objections to certain items in the damages (which we propose to take up in the last part of this brief), appellant's attack upon the judgment of the trial court is directed to three points:

(1) That the law does not under the circumstances of this case recognize presumption of negligence against a tug, but the burden is always upon libelant to prove the same by positive evidence;

(2) That the captain of the "Cudihy" was guilty of mere error in judgment and not of fault;

(3) That the injuries were not received by the "Jane L. Stanford" upon Grays Harbor bar at all.

The answer to these contentions is given, we believe, in our argument foregoing, but some further consideration of them in the order of appellant's treatment may not be out of place.

1.

Appellant's cases are all to the point that a tug is not a common carrier or an insurer of the tow (which no one disputes), and that *ordinarily* damages sustained by the tow do no raise a presumption that the tug has been at fault (which likewise no one disputes). The learned judge below expressly recognizes this rule (Ap. 40), and, indeed, specifically refers to the case chiefly relied upon by appellant, viz., *The J. P. Donaldson,* 167 U. S. 599. But the rule is not that the presumption *never applies,* but that it *ordinarily* does not apply. And the fact that it is sometimes recognized by the law is shown by the very cases cited by appellant itself on pages 22 and 23 of its brief. The language of the second paragraph on page 22 of appellant's brief is, though not in quotations, a verbatim excerpt from *The J. P. Donaldson,* and says merely that the presumption *ordinarily* does not apply.

In

The L. P. Dayton, 120 U. S. 337, 30 L. Ed. 669,

the Supreme Court, after referring to the usual rule that a tug is not an insurer of the safety of the tow (which for ordinary cases is not disputed by the trial court or by ourselves here), says:

> "In some cases the facts of the collision, as admitted in the pleadings, might constitute a prima facie case of negligence, which would impose upon the tug the duty of explanation and exoneration; * * *"

though it happened that the court found no such presumption in that particular case.

In

The Webb, 14 Wall. 406, 20 L. Ed. 774,

the Supreme Court says:

> "But there may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it."

In

The Kunkle Bros., 211 Fed. 542,

again the statement is simply that *ordinarily* the presumption does not apply. Appellant's other cases (pages 22 and 23 of its brief) are simply statements of the general rule and do not dispute that it has exceptions.

That there are exceptions is settled law (too well settled for appellant to question, though it may rail against it—brief, pp. 23-6), as shown by the cases cited by Judge Cushman (Ap. 40), by the reservations

in *The J. P. Donaldson, The L. P. Dayton, The Webb,* and *The Kunkle Bros.,* supra, referred to by appellant itself and by the following further cases:

The Delaware, 29 Fed. 797;

The Genessee, 138 Fed. 549.

The opinion of the trial judge (Ap. 40) was thus not a denial of the ordinary rule, but an express recognition of it, followed by the statement that this was one of those cases where the burden of proof shifts in view of the fact that Grays Harbor was the home port of the "Cudihy," so that it was "the captain's duty to know the depth of water in the channel and the effect thereon of the sea running at the time," and that—

> "Nothing is shown to have existed or transpired but what the captain of the tug was bound to have known and anticipated; nor did the 'Stanford' do anything to impede or interfere in any way with the safe performance of the towage service nor is anything of the kind even suggested" (Ap. 39-40).

The charge of "specious argument," made on pages 24 and 25 of appellant's brief against the learned judge of the trial court, is built upon a mangling of the opinion. In context the opinion does not say that the mere striking of the vessel on the bar is proof of negligence; but rather, "I find that the captain of the tug was in fault in undertaking the tow at a time when it was entirely too rough upon the bar for the depth of water" (Ap. 39). The court based this finding as to roughness of the bar and depth of water there on a review and consideration of the evidence

set out just before the finding (Ap. 39 and preceding pages). Indeed, the answer itself (Ap. 14), as has been so often noted, admits the bar to have been rough and, for that matter, would fain have had it rough enough to provide the tug the defense of perils of the sea (Ap. 14). With reference to the finding of insufficient depth of water, the court noted the draught of the "Stanford" (Ap. 27) and her soundings (Ap. 30) and the fact that, although soundings were taken upon the tug, evidence was not introduced of what they showed (Ap. 31). Having thus considered the evidence and upon such consideration found that the tug was negligent in crossing the bar when it was too rough and the water too shallow, the court then states, and very properly, that Grays Harbor being the home port of the tug and her master being consequently charged with knowledge of channels and tides, it was immaterial whether the insufficiency of depth where the "Stanford" struck was due to the state of the tide or to deviation from the channel. The bar where the vessel struck bottom *was* too shallow for the towage of the "Stanford" in heavy swells and breaking seas. That is the finding on the evidence. Determination as to whether the inadequate depth of water should be attributed to state of tide or missing of channel was unnecessary; it was one or the other, and for mishap flowing from ignorance of tides or of channels the captain was, in his home waters, responsible.

Apart altogether, however, from any presumption, Captain Olson stands affirmatively convicted of negli-

gence. He took the "Stanford" (a sailing vessel committed to his sole care) from a safe anchorage in his home port to a bar where "there was a heavy swell and sea breaking," as admitted by the answer (Ap. 14), the roughest bar which Captain Petersen (who had been sailing out of Grays Harbor six years) had ever crossed with a sailing vessel (Ap. 57). He chose a time two hours before the flood (see the earlier pages of this brief), knowing that this was not the most favorable stage of the tide for crossing (Ap. 86). He went out through an unbuoyed channel (Ap. 62, 83) when the best known channel was marked straight throughout (Ap. 82). The depth of water on the crest of the bar was not more than 22 feet, so that even if the sea had been smooth there would have been less than two feet of water under the "Stanford's" keel (see preceding pages of this brief). Captain Olson was charged with knowledge of these conditions (*The Margaret,* 94 U. S. 494, and other cases cited, supra, and in the opinion of the court below—Ap. 39, 40). He persisted, nevertheless, in going on, though amply forewarned of peril by the whistle of one of appellant's own tugs preceding him (with a vessel of lighter draught) whose captain, being on the bar, had even better opportunity than he to know its condition and thought there was "too much swell on" (Ap. 92).

Appellant would have the court find that the damaging of the "Stanford" amid these manifold elements of danger was due to mere error of judgment on the part of the "Cudihy's" master. This is the second point in appellant's brief (p. 21) to which consideration may next be given.

2.

It is asserted that the owner of a tug is not liable for damage to a tow from mere error of judgment on the part of her master. That is a general statement of a general rule, which, however, is not applicable to the facts of this case. For there is a clear distinction between mere error of judgment in a crisis or emergency and positive wrong-doing in taking a ship out of safety and exposing her to obvious danger.

The cases cited by appellant (brief, 29), with the possible exception of *The E. Luckenbach* (113 Fed. 1017), which is a brief memorandum decision, belong to the former category.

Thus, in

The William E. Gladwish, 196 Fed. 490,

the tug was overtaken during the service by a "sudden squall" (196 Fed. at 491).

In

The Garden City, 127 Fed. 298,

the towage began in such fair weather that it was not imprudent to leave, but, in course of the trip, the wind "became so severe and the sea so rough that the steamer was unable to hold her course and was blown around. It became apparent that the vessels could not proceed, but must seek shelter. *In this emergency,* the question was presented to the sound discretion of the master" etc. (127 Fed. at 301—italics ours).

In

The Battler, 72 Fed. 537,

"the catastrophe was occasioned by a storm of excep-

tional violence and of sudden occurrence'' (72 Fed. at 541).

Captain Olson did not decide *in an emergency* to take the ''Stanford'' over Grays Harbor bar, and thus commit an error of judgment *in a crisis.* On the contrary, as a bar pilot in his home waters, charged with knowledge of winds, tides, depth of water, draught of towed vessel and all such relevant conditions and the probable effects thereof and unhurried by pressure of time, he towed the ''Stanford'' from protected anchorage to and across a bar of heavy swells and breaking seas (Answer, Ap. 14), and this against the warning whistle of the master of another tug belonging to appellant who was in a better position to know the peril of the bar (Ap. 92). The rule of law applicable to such a situation is not found in the crisis and emergency cases cited by appellant, but in

The Margaret, 94 U. S. 494; 24 L. Ed. 146,

wherein the Supreme Court of the United States said:

> ''The Port of Racine was the home port of the tug. She was bound to know the channel, how to reach it and whether, in the state of the wind and water, it was safe and proper to make the attempt to come in with her tow. If it were not, she should have advised waiting for a more favorable condition of things. She gave no note of warning. If what occurred was inevitable, she should have forecasted it, and refused to proceed. * * *
>
> *''Conceding that the mode of entering the harbor by the tug was the best under the circumstances, and the disaster thereafter inevitable, then the effort showed a clear want of judgment. As before remarked, she should have known this, and governed herself accordingly. Her conduct, in this view, was more than an error. It was a fault; and*

upon this ground she should be condemned." (Italics ours.)

And see also the other cases cited with *The Margaret* at page 8, supra, of this brief.

In the light of the foregoing considerations, the sarcasm directed by appellant at the trial judge at page 28 of its brief, and again at page 33, becomes as futile as it is unworthy.

3.

At page 31 of its brief, appellant begins a preposterous theory that the "Stanford" did not strike on the bar; that all her injuries were caused by pounding on rocks or lying on her anchors when she was driven by a storm upon the beach in the harbor ten days prior to being towed out to sea; that she was then so badly damaged that it was necessary for her to go into the Columbia River to be drydocked; that her damaged condition was concealed and her captain fraudulently contrived to be towed out to sea intending to make it appear that the damage occurred in crossing the bar and to saddle the expense of docking and repairs upon the tug. This theory is not advanced boldly, but insinuatingly, in the question, "Who can say that she did not receive all, or the greater part, of her injuries there?" That question is distinctly answered by the positive testimony of Captain Petersen that the ship did not pound on the beach (Ap. 58, 65, 68), that she did not lie on her anchors (Ap. 67), and that she

did not leak nor take in a quarter of an inch of water from the time when she was loaded until after striking on the bar (Ap. 66). Mrs. Petersen testified that the ship did not pound on the beach (Ap. 77). Fred Johnson testified that the ship dragged her two anchors, dragged upon the beach at low tide, and that she went sidewise (Ap. 73, 74). There is not a scintilla of evidence that there were any rocks on that beach or that the ship lay upon her anchors. To have dragged her anchors up on the beach was impossible. This wild theory assumes that Captain Petersen acted not only fraudulently but with foolhardiness in exposing his own life and the lives of his wife and child and all of the crew by venturing to sea in a damaged ship heavily loaded in the stormy season. It is supported only by conjectural and hearsay evidence and sailors' gossip and the fact that the crew mutinied. There was a mutiny and the shipping commissioner was called upon to act. He necessarily was informed as to the grounds upon which the sailors refused to do their work in the ship; there could be no concealment from him of the fact, if it were a fact, that they refused to stay in an unseaworthy vessel. If so informed, what he did in settling the disturbance was criminal, for he transferred the crew to another vessel and shipped the crew of that other vessel for the voyage on which the "Stanford" was bound (Ap. 67). By bringing the mutiny to bear this fanciful defense overreached itself, for the action of the shipping commissioner refutes the whole theory. The defense was an obvious afterthought. It was not pleaded in the answer.

The damages.

The appellee is entitled to recover full compensation for the injury by the rule of restitutio in integrum.

The Potomac, 105 U. S. 630, 26 L. Ed. 1194.

The stipulations (Ap. 50, 140) and the assignments of error relieve the court from the necessity of any investigation as to details of the injuries to the ship or costs of repairs. Only four items included in the amount of damages awarded by the decree are contested. The first of these is fifty dollars for Captain Petersen's personal expenses while attending to all the business of getting the ship towed in and out of the Columbia River, discharging and reloading the cargo, docking, repairing, auditing expense bills and securing a new crew. That amount of expense was not excessive and was actually and necessarily incurred (Ap. 122, 125-6). The second contested item is for $250, commissions paid for securing a new crew, which was necessary to enable the ship to proceed on her voyage after being repaired. The amount was actually disbursed and the necessity for it proved and explained by the testimony of Captain Petersen (Ap. 122, 123, 126), and found by Judge Cushman to be customary and necessary (Ap. 42). The third item is for $160.80, expenses of the general average adjustment. As different parties own the ship and cargo, an adjustment of losses and contributions was necessary and the amount allowed by the decree for the necessary expense is fair and reasonable. That amount comprises $30 fee of adjustment committee, $100 for the adjuster's fee, and $30.80 for expense of printing the adjuster's re-

port. (Proved by the deposition of the adjuster, Mr. Alexander, Ap. 130, 31, 32). We cite as authorities justifying allowance of these items the following cases:

The Energia, 61 Fed. 222-224; affirmed in 66 Fed. 604, 608;

Erie & W. T. Co. v. City of Chicago, 178 Fed. 42, 51.

The fourth item is for $1820.27, interest on the amount of the money actually expended at six per cent. per annum for a period of five years. The only error in making this allowance is for the appellee, and not for the appellant, to complain of. Nearly seven years intervened between the time of the injury and the date of the decree. The amount of the appellee's actual cash expenditures is $6067.68. The money all passed through the hands of Brown & McCabe, the ship's agents at Portland. They made two drafts on the appellee, one for $5443.15, and the other for $2723.17, which were paid (testimony of Hedges, Ap. 127, 8, 9). Interest is due to the appellee as a legal right on the amount of money actually expended according to the decisions of this court in a line of cases.

Wellesley Co. v. Hooper, 185 Fed. 733, 740;

The Jeanie, 236 Fed. 463, 473.

Seven years intervened between the time of the injury and the date of the decree, but the trial court allowed interest for only five years of that time. The reason given by Judge Cushman for cutting down the interest for only a period of five years is that the case was not brought on for a final hearing at an earlier

date. There was, however, no showing that the appellant was restrained from pressing the case, nor that it was prejudiced by delay. Therefore, we respectfully submit that mere forebearance on the part of the appellee is not ground for forfeiture of a legal right, and, inasmuch as there is no substantial ground for this appeal, it deserves to be treated as frivolous. And we ask the court to affirm the decree with a modification allowing interest for one year and nine months additional time, so that the amount of the decree, exclusive of costs, will be $9,655 instead of $9,018.

Dated, San Francisco,
February 15, 1918.

Respectfuly submitted,

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